No. 91-703

In The

Supreme Court of the United States

October Term, 1991

GUSTO RECORDS, INC. AND G.M.L., INC.,

Petitioners,

vs.

B.J. THOMAS, GENE F. PITNEY, SHIRLEY OWENS ALSTON, DORIS COLEY JACKSON, BEVERLY LEE AND VERNON McFADDEN, JR.,

Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF AND BRIEF OF RHINO RECORDS, INC. AS AMICUS CURIAE IN SUPPORT OF APPLICATION FOR WRIT OF CERTIORARI

Bob Lynch, Jr.
222 Second Avenue, North
Suite 316
Nashville, TN 37201
615-255-2888
Attorney for Rhino Records, Inc.

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

1. WHETHER A PURCHASER OF MASTER RECORDINGS ASSUMES THE UNPAID ROYALTY OBLIGATIONS OF PRIOR OWNERS OF THE MASTER RECORDINGS.

2. WHETHER A RECORDING AGREEMENT MAY BE REWRITTEN TO RECONSTRUCT ROYALTY OBLIGATIONS OF A LICENSOR OF MASTER RECORDINGS.

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Pursuant to Rule 37 of the Rules of this Court, Rhino Records, Inc. joins with Dominion Entertainment, Inc., which has previously sought permission to file an amicus curiae brief, and respectfully moves the Court for leave to file a Brief Amicus Curiae in the above-captioned case in support of the Petition for the Writ of Certiorari to the Sixth Circuit Court of Appeals. It adopts the Motion of

Dominion Entertainment, Inc., *in toto*. Petitioners have granted their consent to this filing. Respondents have not. Rhino Records, Inc., submits, herewith, however, its own proposed Brief.

INTEREST OF RHINO RECORDS, INC.

Rhino Records, Inc. is also in the business of, among other things, purchasing master recordings and obtaining and issuing licenses to make sound recordings. In this case, the decision of the Sixth Circuit Court of Appeals would be harmful to the interests of Rhino Records, Inc. and to the recording industry as a whole, and not just to the interests of the Petitioners in this case. By ruling that the purchaser of master recordings thereby assumes all previous unpaid royalty obligations of prior owners of the master recordings, and by redefining the term "licensee" as it is used in recording contracts used throughout the industry, the Court of Appeals has effectively rewritten many licensing agreements and has changed the economic interest of all who buy and sell master recordings. Moreover, the Petitioners appear not to have addressed fully the question of law as to whether a mere purchaser of master recordings assumes any artist royalty obligations by the mere purchase of that master recording.

CONCLUSION

For all of these reasons, Rhino Records, Inc. respectfully asks that the Court grant its Motion for Leave to File its Brief as Amicus Curiae in this case in support of the grant of the Petition for Certiorari to review the decision of the United States Court of Appeals for the Sixth Circuit.

Respectfully submitted,

BOB LYNCH, JR.
222 Second Avenue, North
Suite 316
Nashville, TN 37201
615-255-2888
Attorney for Rhino Records, Inc.

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BRIEF OF RHINO RECORDS, INC., AMICUS CURIAE

INTEREST OF AMICUS CURIAE

The interest of Amicus Curiae is set out in the Motion for Leave to File, *supra*.

ARGUMENT

A. A purchaser of master recordings assumes no royalty obligations to an artist.

The divided court below found that the Petitioners, as purchasers of master recordings, somehow assumed the unpaid royalty obligations of all previous owners of those master recordings. On a Petition to Rehear, the divided Sixth Circuit affirmed this decision. Rhino Records, Inc. asserts that the Petition for Certiorari should be granted in order that the Court may review this fundamentally erroneous decision which would upset the economic balance of the recording industry, particularly of companies which purchase master recordings. This case is apparently a case of first impression. Moreover, Rhino, Inc. asserts that a mere purchaser of master recordings does not assume any obligation to pay artist royalties because those artist royalties are purely a creation of contract between the artist and the record company with which he originally entered a contract.

The Sixth Circuit Court of Appeals has held that the final purchaser in a chain of several purchasers assumes all unpaid royalty obligations of previous owners of the

masters. This is despite the fact that none of the owners of the master recordings other than originally contracting Record Company has any contractual relationship with the Artist.

Under fundamental legal principles, one not a party to a contract is not bound by its obligations. Moreover, there is no inherent or enforceable moral right merely because one owns a master recording and makes records therefrom, to pay the recording artist whose voice is embodied thereon a royalty. Even though there is no enforceable legal obligation to pay royalties, it is the practice of Rhino Records to pay an artist royalties for exploitation of masters by it. This is to be contrasted with the concept of *droit moral*, a legal doctrine recognized in European countries. *See, e.g., Patry, Latman's The Copyright Law*, pgs. 88 and 89 (6th. Ed. 1986). Additionally, California became the first and only state to grant to an artist by statute a *droit de suite*, a right to share in proceeds from a resale of works made by the artist unless the right is waived by a written contract. In passing the California Resale Royalties Act, Cal. Civ. Code § 1986 (1977 as amended in 1983), the California legislature recognized that an artist has no inherent right to receive monetary gain from the resale of his work. American law has developed contrary to European law on this question. The decision of the Sixth Circuit Court of Appeals otherwise should be reviewed and reversed.

Likewise, but for additional reasons, a bona fide purchaser of master recordings in an arm's-length transaction does not succeed to any unpaid royalty obligations of previous owners of masters because a purchaser of an asset does not automatically assume the obligations of

previous owners. This is true regardless of whether the item purchased is a master recording or some other tangible good. To hold otherwise would be to chill, if not completely stop, the purchase of master recordings by companies such as Rhino Records, Inc. Were it liable for any royalty obligations which may have been unpaid years and years ago, it may very well choose not to purchase master recordings. Naturally, the artist is still entitled to receive royalties from the company with which he originally contracted, even though the sales are by those who have acquired the masters from the original record company or its transferees.

B. A licensing Record Company should not be robbed of the benefit of its bargain by a redefinition of "licensee."

The Sixth Circuit Court of Appeals effectively rewrote not only the contracts between the Respondents and the Petitioners, but its logic and precedent would effectively rewrite most, if not all, standard industry recording agreements and licensing agreements. The Sixth Circuit defined "licensee" in a standard recording industry contract to mean only a licensee which is affiliated with the licensor. It held that if a record company licensed a master recording in a genuine arms-length transaction, it would be obligated to pay the recording artist fifty percent (50%) of all license fees received from the licensee, despite the fact that its contract with the Artist provided only for a smaller percentage (2 to 2 1/2%) as a royalty to be paid from licensee fees. To rewrite the contract by redefining license is both intellectually dishonest and unsupportable.

To ignore the contract and allow the rewriting of license agreements would be disastrous to all record companies which license their master recordings for obvious reasons. Were the contractual expectation of the licensor only an obligation to pay two percent (2%), yet under a court's scrutiny that obligation becomes fifty percent (50%) of all fees received, economic chaos would ensue.

CONCLUSION

For all of these reasons, Rhino Records, Inc. as amicus curiae would urge the court to grant the Petition for the Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit and vacate its judgment.

Respectfully submitted,

Bob Lynch, Jr.
222 Second Avenue, North
Suite 316
Nashville, TN 37201
615-255-2888
Attorney for Rhino Records, Inc.